

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DOCINA RENE ESPINO,)
) CASE NO. C12-0967-RSL-MAT
Plaintiff,)
)
v.)
) REPORT AND RECOMMENDATION
MICHAEL ASTRUE,)
Commissioner of Social Security,)
)
Defendant.)
_____)

Plaintiff brought this action to seek judicial review of the denial of her application for Disability Insurance Benefits (DIB) by the Commissioner of the Social Security Administration. The parties now agree that this case should be reversed and remanded pursuant to sentence six of 42 U.S.C. § 405(g) because the recording of the hearing held in this matter on March 15, 2011 cannot be located. (Dkt. 11.) However, as described below, the parties disagree on the imposition of time limits in the search for the missing records. (Dkts. 12 & 13.)

Plaintiff objects to the Commissioner’s request for authorization to search for the missing records for a “reasonable period of time,” noting seven years have passed since the filing of her DIB application and that the Appeals Council has already had several months in

01 which to attempt to find the missing records. (Dkt. 12.) Plaintiff requests that the
02 Commissioner be ordered to file a complete answer with this Court within thirty days of the
03 date of an Order of Remand or, if the Commissioner is unable to do so, that the Appeals
04 Council, within that same thirty-day period, issue an order remanding plaintiff's claim to the
05 Commissioner's Office of Disability Adjudication and Review to allow for the scheduling of a
06 new hearing to be held within 120 days of the date of the Appeals Council's remand order.

07 The Commissioner objects to the "extraordinarily short deadlines" requested by
08 plaintiff. (Dkt. 13.) The Commissioner notes plaintiff's failure to set out extraordinary
09 circumstances making her case eligible for critical case processing, such as demonstration of a
10 terminal illness, compassionate allowance, dire need, a suicidal or homicidal claimant, or a
11 military service casualty case. Hearings, Appeals and Litigation Law Manual (HALLEX)
12 I-2-1-40 (Critical Cases). *See also* HALLEX I-4-3-33 (Court Remands; Special Procedures
13 for Critical Cases). The Commissioner, nevertheless, agrees to expedite processing of the case
14 on remand.

15 The Court first observes that the "HALLEX does not have the force and effect of law[.]"
16 *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th Cir. 2000) ("... HALLEX is strictly an internal
17 guidance tool, providing policy and procedural guidelines to ALJs and other staff members. As
18 such, it does not prescribe substantive rules and therefore does not carry the force and effect of
19 law."). *See also Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) (HALLEX does not
20 impose "judicially enforceable duties.") Therefore, neither the Commissioner, nor the Court is
21 bound to limit a request for expedited review to the circumstances addressed in that manual.
22 Moreover, in addition to the fact that the Commissioner nonetheless agrees to expedite the

01 processing of this case, he neither provides an explanation as to why a greater period of time
02 than that suggested by plaintiff is necessary for further attempts at locating the missing records,
03 nor provides an alternative suggestion on what period of time would be sufficient.

04 The Court finds plaintiff's request for the imposition of time limits reasonable.
05 However, giving the Commissioner the benefit of the doubt, the Court concludes that a longer
06 initial period for the location of the file would be appropriate. As such, based on the agreement
07 of the parties, the Court recommends this case be REVERSED and REMANDED for further
08 administrative proceedings pursuant to sentence six of § 405(g). On remand, the
09 Commissioner and Appeals Council will expedite the case and have **sixty (60) days** to continue
10 to search for the missing recording and to file an answer in this Court upon location of those
11 records. If the recording cannot be located, the Appeals Council, within that same **sixty-day**
12 **period**, will remand the case for a *de novo* hearing to be held within **120 days** of the date of the
13 Appeals Council's remand order.

14 The Court will retain jurisdiction over the action pending further administrative
15 proceedings. See *Melkonyan v. Sullivan*, 501 U.S. 89, 98-102 (1991). If the outcome of a *de*
16 *novo* hearing is unfavorable to plaintiff, defendant will move to reinstate the case so that
17 plaintiff need not file a new complaint in order to obtain judicial review. A proposed order
18 accompanies this Report and Recommendation.

19 DATED this 2nd day of January, 2013.

20 

21 Mary Alice Theiler
22 United States Magistrate Judge